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Supreme Court, U.S.
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In the

# Supreme Court of the United States

OCEAN HARBOR HOUSE
HOMEOWNERS ASSOCIATION,

*Petitioner,*

v.

CALIFORNIA COASTAL COMMISSION,

*Respondent.*

**On Petition for Writ of Certiorari to the Court of Appeal of California, Sixth Appellate District**

## REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner Ocean Harbor House Homeowners Association (OHH) respectfully files this reply to the opposition to Petition for Writ of Certiorari (Opp.) filed by Respondent California Coastal Commission (CCC).

## INTRODUCTION

Justice Holmes wrote that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 415 (1922). In this case, Petitioner OHH asks this Court to draw a figurative line—a line that will help courts identify exactions on new development that go too far. The facts and circumstances of this case clearly demonstrate a need for this Court to provide guidance for applying the "rough proportionality" standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

## I

## THE PETITION RAISES AN IMPORTANT QUESTION ABOUT A MUCH APPLIED FIFTH AMENDMENT REGULATORY TAKINGS TEST

The Utah Supreme Court recently complained that "by using the phrase 'rough proportionality,' [this] Court has engendered vast confusion about just what the municipalities and courts are expected to evaluate when extracting action or value from a land owner trying to improve real property." *B.A.M. Development, L.L.C. v. Salt Lake County*, 196 P.3d 601, 603 (UT 2008). In *Dolan*, this Court explained the meaning of the nexus standard of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and set out a standard by which to determine if the nexus requirement is satisfied. *Dolan v. City of Tigard*,

512 U.S. at 386. The instant case seeks guidance in applying *Dolan*'s rough proportionality standard; Petitioner seeks a standard that can be applied uniformly to the myriad factual circumstances involved in constitutional challenges to development exactions.

The CCC is wrong when it claims that OHH does not raise an important federal question. The *Nollan* and *Dolan* standards arise in such common and varying circumstances that these exactions tests surely are the most frequently encountered of the four takings tests endorsed by this Court in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). The CCC cannot deny that *Dolan*'s rough proportionality standard is applied whenever a government entity imposes conditions intended to mitigate the impact of new development. Exactions are routinely imposed for impacts on public transportation systems, schools, parks, hospitals, senior care facilities, day care facilities, and airports. Several cities in northern California recently attempted to impose fees on new development to finance the expansion of local public cemeteries. A northern California county required an aviation easement as a condition of every building permit, even if the permit application was to build a pool or a garage. The list is endless. And exactions are increasingly imposed on the occasion of development for social welfare purposes, such as to create affordable housing and protect endangered species. *See* Brief Amicus Curiae of California Building Industry Association and Home Builders Association of Northern California in Support of the Petition for Writ of Certiorari.

The CCC claims that, if *Dolan*'s application is limited to exactions requiring a dedication of land, this

case only raises a question of state law. Opp., at 6 n.1. But this case does not ask the court to consider whether *Dolan* applies to exactions in the form of fees, and that issue was neither litigated nor decided below. The fact is the California Supreme Court has held that the exactions standards of *Nollan* and *Dolan* apply to ad hoc monetary exactions. *See Ehrlich v. City of Culver City*, 911 P.2d 429, 444 (Cal. 1996); *San Remo Hotel v. City and County of San Francisco*, 41 P.3d 87, 102-03 (Cal. 2002). The question argued to and decided by the courts below was whether the *Dolan* standard was met. *See* decision of the court of appeals at Appendix to Petition (App.) A-32 ("Both *Nollan* and *Dolan* involved permit conditions that required the dedication of land or an interest in land. However, the *Nollan-Dolan* test is not limited to such conditions."); *also see* the trial court decision at B-11-13 ("The 'rough proportionality' test is met in this instance." App. B-13.).

The question before this Court is whether the sort of analysis used to find rough proportionality in this case meets the requirements of *Dolan*. An answer to this question will have far-reaching consequences.

## II

## THE CIRCUMSTANCES OF THIS CASE CLEARLY DEMONSTRATE THE NEED FOR A FRAMEWORK TO ENSURE THAT EACH ELEMENT OF *DOLAN*'S ROUGH PROPORTIONALITY TEST IS MET

Various acts of the CCC, acts endorsed by the court of appeal, set a dangerous precedent: attenuated impacts and data are sufficient to justify a finding of rough proportionality. The direct impact of OHH's

seawall is the loss of one acre of public beach. The CCC staff recommended use of the real estate valuation method to calculate the required mitigation because it is "most closely tied to the specific land values in the vicinity of the project." Administrative Record (AR) 4:742. The staff's research found that the fair market value of one acre of beach was $1 million. AR 4:735-36. This fee would have met *Dolan*'s requirement that mitigation be "related in nature and extent" to the impact of the development. See *Dolan*, 512 U.S. at 391. But, the Commission, with the express intent of increasing the amount of the monetary exaction, ignored this part of the *Dolan* test.

The CCC ultimately decided to use the economic recreational value method to increase the fee to more than $5 million. (One Commissioner complained that $1 million was "far below what I think is going to be an appropriate amount." AR 11:2005. Believing that $5 million will be of more benefit than $1 million, he moved to increase the fee. AR 11:2022.) The economic recreational value method required that the description of the seawall's impact change from the loss of one acre of public beach to a more attenuated impact—the projected loss of recreational opportunities suffered by the public. And the theoretical bases for calculating this loss were far more amorphous than the traditional means of valuing real estate.

Furthermore, there is no assurance that the mitigation fee will mitigate the impact of the seawall. Because no beachfront property was available for purchase in the Monterey Bay area (AR 4:741-42), the money paid by OHH will be used to acquire new public recreational land in the vicinity of the project (AR 12:2078, 14:2480) and, if not spent within 10

years, "would be donated to one or more of the State Parks located along southern Monterey Bay" or may be given to any "organization acceptable to the Executive Director." AR 14:2480. ("[F]uture acquisition [of beach property] cannot be guaranteed." AR 14:2514.)

As noted in OHH's petition, the test utilized by the Utah Supreme Court in *B.A.M. Development* provides a useful framework for analyzing the rough proportionality standard of *Dolan*. Petition for Writ of Certiorari at 15-16. The test includes factors to ensure that an exaction is related in both nature and extent to the impact of the proposed development. *Dolan*, 512 U.S. at 391. The CCC states, and OHH agrees, that the test outlined and applied in *B.A.M. Development* does not diverge from the dictates of *Dolan*. *See* Opp. at 7. But, when the facts of the instant case are analyzed using the *B.A.M. Development* framework, the rough proportionality standard is not met. *See* Petition at 16-17. This demonstrates what happens when the lower courts do not believe that *Dolan* really means what it says: "[T]he dedication must be related both in *nature* and *extent* to the impact of the proposed development." *Dolan*, 512 U.S. at 391 (emphasis added). Neither of those elements were discussed in the lower court's opinion.

This Court's endorsement of the test applied in *B.A.M. Development*, or adoption of a different test, will ensure that the *Dolan* standard serves as a bulwark against government regulation that "goes too far."

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: January, 2009.

Respectfully submitted,

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